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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 97

WILLIAM A. GOODLOE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT THEREOF.

CHARLES E. FORD,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

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THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, William A. Goodloe, in support of his Petition for a Writ of Certiorari to review the final judgment of the United States Court of Appeals for the District of Columbia Circuit, entered December 14, 1950, affirming his conviction on three counts of a four-count indictment charging the petitioner in the first count with intent to procure a miscarriage, in the second count charging conspiracy to obstruct justice, in the third count charging the

promising or offering of a bribe to a witness with intent to procure the witness to absent herself from the proceedings in the matter involved in the first count, respectfully shows:

A

Summary Statement of the Matter Involved

This proceeding was initiated by an indictment in the United States District Court for the District of Columbia (R. 2-5). The indictment charged in the first count that the petitioner used an instrument or prescribed medicine or drugs with intent to procure a miscarriage. In the second count, petitioner was charged with conspiring with one Alice Galusha to obstruct justice. In the third count, petitioner was charged with promising or offering a bribe to a witness with intent to procure the witness to absent herself from the proceedings in the matter involved in the first count. A verdict of not guilty was directed on the fourth count of the indictment, which also charged bribery.

Thereafter, petitioner was put on trial before a jury, and was found guilty on the first, second, and third counts (R. 49-53).

Thereafter, on June 23, 1950, appellant was sentenced as follows: Count one, 20 months to 5 years; Count two, 8 months to 2 years; Count three, 8 months to 2 years; the sentence on Count two to take effect at the expiration of the sentence imposed on Count one, and the sentence on Count three to run concurrently with the sentence imposed on Count two.

Factual Situation

Statement of the Case

In order to properly evaluate the questions presented, it is necessary to go into some detail into the factual situation of the case.

Petitioner was indicted on an indictment in four counts, charging the petitioner alone in the first count with using an instrument or prescribing medicine or drugs with intent to procure a miscarriage. The second count charged petitioner jointly with one Alice Galusha with conspiring to obstruct justice. The third count charged the petitioner jointly with Alice Galusha with promising or offering a bribe to a witness with the intent to procure the witness to absent herself from the proceedings in the matter involved in the first count.

In support of the charges, the prosecution called one Gloria Huffman, who testified in substance that she, an unmarried woman, became pregnant as a result of sexual relations with one Andrew Gleeson that took place on November 5, 1949; that not being certain of her condition, she consulted two physicians in Baltimore, where she lived; that she consulted a Dr. Wilson, who sent her to a laboratory for examination, and he then sent her to a Dr. Millea, an obstetrician, who advised her that she was, in fact, pregnant, and made an appointment for her to return for further prenatal care; that in accordance with a prearrangement, on February 4, 1950, Gleeson took her to petitioner's office and home in the District of Columbia; that Gleeson paid the petitioner $350; that petitioner then inserted an instrument into her body and administered some medicine and put her to bed in a bedroom in his home; that after two or three days in the petitioner's home, she had a miscarriage and Gleeson called for her and took her back to Baltimore; that while Miss Huffman was at petitioner's home, she was ministered to by one Bessie, and that Bessie acted as her nurse.

Andrew Gleeson was called as a witness and he testified that he did have sexual intercourse with Miss Huffman on November 5, 1949; that he took Miss Huffman to petitioner's

office, paid him $350, and that he called for her several days later and took her back to Baltimore; that all of this was done as a result of a prearrangement between Gleeson and the petitioner.

Dr. Harry Smith of Gallinger Hospital in this city testified that on April 15, Miss Huffman entered Gallinger Hospital and that she was having a genital bleeding; that he examined her and diagnosed her condition as being the result of an incomplete abortion; that he found placental tissue and that such tissue could have been there for months as a result of an abortion prior to her visit to petitioner.

Dr. Wilson of Baltimore testified that Miss Huffman came to see him in December of 1949 and that she wanted to ascertain if she were pregnant; that he instructed her to go to the University Hospital for a test; that after receiving the results of that test, he referred her to an obstetrician, a Dr. Millea.

Dr. Millea testified that he saw Miss Huffman on December 23 and outlined a prenatal program for her, but that he never saw her again; that he found that she was a healthy woman and was five or six weeks pregnant.

Miss Huffman further testified that a Miss Alice Galusha called on her at her home in Baltimore on April 20 and offered to pay her expenses if she, Miss Huffman, would leave town and not testify against the petitioner; that she received further telephone calls from Miss Galusha and that Miss Galusha stated in one of these calls that it was being made from Washington. She testified further that on April 22, Miss Galusha called at her apartment in Baltimore and spoke with her about arranging to buy Miss Huffman an airplane ticket to California and to furnish money for expenses, with the understanding that Miss Huffman would leave for California immediately; that Miss Huffman was under subpoena to appear as a witness before the Grand

Jury in the District of Columbia at the time of this conversation. That at that time, two Baltimore police officers were hidden in a closet in Miss Huffman's apartment and placed Miss Galusha under arrest. The two officers testified as to overhearing the conversation between Miss Galusha and Miss Huffman as to Miss Galusha's arranging to buy Miss Huffman an airplane ticket to California and to furnish expense money.

A Dr. Pair testified that petitioner on April 22 came over to his, Dr. Pair's, office in Baltimore with Miss Galusha, and that while Miss Galusha went to the address of Gloria Huffman, the petitioner remained in Dr. Pair's office. Dr. Pair further testified that petitioner had told him that Miss Galusha was calling to see Miss Huffman because she, Miss Galusha, had heard that Miss Huffman was making a charge of abortion against him.

Two deputy U. S. Marshals testified that they executed the arrest warrant; that, at the time of the arrest, one of the deputies testified that petitioner stated to him that he did not know Miss Huffman or Miss Galusha and he was retired and living off real estate investments; the other deputy who was in the same room testified that he did not hear this statement.

On behalf of petitioner, Bessie White testified that she was the cook for petitioner and had been employed in that capacity for about 10 years; that she remembered when Miss Huffman was at petitioner's house; she denied that she had acted as a nurse to Miss Huffman and stated that all she did was to bring Miss Huffman her meals. She denied that she in any manner acted as a nurse or ministered to Miss Huffman, as testified by Miss Huffman.

Petitioner testified in his own behalf and stated that he had been a practicing physician in the District of Columbia for the past 25 years; that some time in the latter part

of January 1950 he received a telephone call from a Captain Gleeson, who wanted an appointment with him for that evening; that on that evening the Captain came by himself to petitioner's office and said that he had a lady friend that he wanted petitioner to examine; that her complaint was that her menstrual period had been going on for about eight or ten days and recurred ten days later, lasting from fifteen to twenty days. That this condition had been going on for some time since she came from the West Coast; that petitioner then asked Gleeson whether or not she had seen any other doctors and was advised by Gleeson that she had seen several doctors in Baltimore, but that they didn't seem to want those kind of calls. Petitioner further testified that Gleeson told him that he had heard that petitioner was a very good physician and wanted him to examine Miss Huffman; that Gleeson then made an appointment for February 4, which was his day off.

Petitioner further testified that on February 4, Gleeson came with Miss Huffman, and he invited Miss Huffman to his private office, where Miss Huffman told him about the irregularity of her menstrual period, and that such irregularity had been going on since she came east. That thereafter, petitioner examined her physically, giving her a vaginal examination and a rectal examination, and that during the rectal examination she began to bleed from her vagina; that he took a sterile speculum and inserted it into the vagina so that he could see where the blood was coming from; that he saw the blood come from the cervix and took a bottle of sterile cotton and a uterine forcep and swabbed the vagina out, and then packed her, telling her to lie still for a while.

Petitioner further testified that he then went out to the examining room, and when advised by Gleeson that Gleeson wanted to take her back to Baltimore at that time, petitioner stated that he had better leave her at petitioner's

house for a couple of hours; that it would not be a good idea to take the long ride back to Baltimore; that Gleeson then left; that thereafter petitioner gave Miss Huffman five tablets of stilbestrol, which she swallowed.

Petitioner testified that these tablets had a tendency to cause the blood to coagulate and stop bleeding; that he then gave her some phenobarbital and took her upstairs to rest; that later on in the day, Gleeson telephoned and petitioner told him that Miss Huffman was bleeding too badly to leave and should be kept overnight; that Gleeson let her remain at petitioner's home on Sunday and Monday on advice of petitioner, and that on Tuesday, February 7, Gleeson came to the petitioner's home and asked the petitioner what the charge was; that petitioner said $150, which sum included observation and treatment, as well as staying for the three days at petitioner's home; that when they were leaving, petitioner told Miss Huffman to be careful, and that she would need further medical and laboratory treatment to find out the true nature of this bleeding.

Petitioner testified that he next heard from Miss Huffman about the middle of March, when she telephoned him and stated that the treatment petitioner had given her worked fine, but that she still saw traces of blood; that on March 31, she telephoned him again and told him that the bleeding had stopped and then resumed. That petitioner told her to come to his office, which she did. He gave her a prescription for frenosil, and he again advised her that she needed further medical and laboratory study to determine the true nature of the bleeding.

Petitioner testified that he did not hear from Miss Huffman again until April 15, when she telephoned and stated that although she had been feeling fine, she had resumed bleeding and wanted another prescription; that as he had to go out, he left the prescription for Miss Huffman with

his cook, Bessie; that thereafter that evening he received another telephone call from Miss Huffman, who stated that she was bleeding very badly; that he told her to come to his office right away, so that he could put her in Gallinger Hospital; that he advised her he would come to where she was and get her, or that she could come to his place; that she stated that she would rather come over to petitioner's office, but that she never did appear, and that petitioner had never seen or heard from her since.

Petitioner further testified that on April 17, he received a mysterious phone call, and that thereafter he spoke to Miss Galusha, who was a friend of his wife, and told her that he had received two phone calls which accused him of doing an abortion on a girl named Huffman; that Miss Galusha stated that it looked like a shakedown or blackmail, and she volunteered to talk to Miss Huffman; that petitioner didn't see Miss Galusha until April 21, when she told him that she had seen Miss Huffman and had had a talk with her; that Miss Galusha said that she would like to see Miss Huffman again, and asked petitioner to drive her over to Baltimore; that Miss Galusha came to petitioner's office on the following day and he drove her to Baltimore; that when he got there, he stopped at Dr. Pair's office, and after staying there a while, Miss Galusha left for Miss Huffman's residence; that petitioner remained at Dr. Pair's home, and when Miss Galusha did not return, petitioner went back to Washington, alone.

Petitioner denied that he told the deputy marshals that he did not know Miss Huffman or Miss Galusha. Petitioner further testified that in his opinion, Miss Huffman was suffering from menorrhagia, and that the medicine he had prescribed was for the treatment of that condition.

A Dr. Ackiss was called as a witness on behalf of petitioner, and in response to a hypothetical question, stated that in his opinion the examination and treatment given by

petitioner was proper, that the condition described could be diagnosed as menorrhagia; and that placental tissue could remain in the uterus for months after an abortion.

During the course of the trial, counsel for petitioner called the Court's attention to the fact that Juror No. 10 was taking notes, and counsel advised the Court that he objected to that and moved for a mistrial. The Court denied the motion and refused to admonish the juror to refrain from taking notes. That same Juror No. 10 turned out to be the foreman of the jury when it returned to render its verdict.

After the verdict was announced by the foreman as "Guilty" on all three counts, counsel for the petitioner requested a poll of the jury as to Count one, and all jurors answered "guilty" except Juror Clarence Mayo, who answered "not guilty on the first count, but then we weeded it out afterwards." The Court then asked that juror "Your verdict is not guilty on the first count?" The juror replied, "Now, it was guilty, Judge, but when we got in the room on discussion . . ." At that point, counsel for petitioner interrupted and out of the hearing of the jury stated to the Court that he desired the record to show that the foreman of the jury turned to the juror and talked to him right after he had said "not guilty."

Thereafter, the Court stated that if there were any question as to there being a unanimous concurrence, he would direct the jury to retire for further deliberation. Petitioner's counsel again directed the Court's attention to the fact that the jury foreman directed remarks to the juror Mayo when he reported his verdict as "not guilty." The Court took no action about this fact, but stated to petitioner's counsel that he assumed that he was not questioning the jury's unanimous concurrence, for if he were, he would direct the jury to retire for further deliberation. To this statement by the Court that he was assuming consent

on the part of the petitioner's counsel that there was a concurrence of opinion, petitioner's counsel stated that he was not consenting to Court's assumption of this and stood on the record. Thereupon the Judge said that he was stating his interpretation for the record, and the petitioner's counsel thereupon stated that he respectfully disagreed with the Court's interpretation. Thereupon the Judge stated to the jury: "Ladies and gentlemen of the jury, as the Court understands it, you unanimously reached a verdict of guilty. That is correct, is it not?" To this question there was no response from the jury.

On June 23, 1950, petitioner was sentenced as follows: Count 1, 20 months to five years; Count 2, 8 months to 2 years; Count 3, 8 months to 2 years, with the sentence on Count 2 to take effect at the expiration of the sentence imposed on Count 1, and the sentence on Count 3 to run concurrently with the sentence imposed on Count 2.

B

Statement of the Jurisdiction of This Court

1. Statutory Provision Believed to Sustain the Jurisdiction. The jurisdiction of this Court is invoked under Section 1254 of Title 28 of the U. S. Code.

C

The Questions Presented

1. Whether the trial Court committed error by allowing one of the jurors to take notes during the course of trial, both prior and subsequent to objection thereto by petitioner.

2. Whether upon the trial of a Negro for an alleged abortion on a white woman, it is proper for the prosecutor on cross-examining Negro witnesses to stress that complainant was a white woman, especially where complainant appeared and testified and was observed by the jury.

3. Whether it was improper for the trial Judge in his

charge to the jury to continually and in detail emphasize the testimony of the prosecution witnesses and fail to do so in regard to testimony on behalf of the petitioner.

4. Whether it is error for the Court to refuse to give an instruction to the effect that the complainant in an abortion case, while not legally an accomplice, inasmuch as she morally implicated herself in the act, the jury should consider that circumstance as bearing on her credibility.

5. a. Whether it is error for the Court to interrogate a juror who dissents during a poll of the jury.

b. Whether it is error for the Court to record a verdict after interruption of a juror who dissents during a poll of the jury, and after the failure of any juror to answer the question of the Court as to whether they unanimously reached a verdict of guilty.

D

Reasons Relied On for the Allowance of the Writ

1. The decision of the Court below with respect to question 1 is not in harmony with a decision on that question in the Sixth Circuit in the case of *U. S.* v. *Davis* (1900; C. C. 103 F. 457; affirmed in 1901; C. C. A. Sixth, 107 F. 753). Further, the question of the propriety of a juror taking notes during the course of a trial has never been passed on by this Court and is a matter of great importance in the conduct of criminal trials, and should be passed on by this Court.

2. With respect to the second question, this Court should not tolerate any conduct on the part of a prosecutor which would tend to create bias on a racial question, and a pronouncement from this Court on that question is of great importance.

3. With respect to the third question, it is respectfully submitted that this Court should not tolerate the trial

Court's commenting on the evidence in such a manner as to emphasize in detail the testimony of the prosecution witnesses and fail to do so equally in regard to the testimony of witnesses on behalf of a defendant.

4. With respect to question No. 4, it is pointed out that such an instruction was heretofore approved by the Court below in a similar case decided by that Court.

5. With respect to question 5, a and b, it is of great importance in the conduct of criminal trials for this Court to announce the law as a guide to the trial courts when similar situations arise. Such situations as presented in this question have arisen frequently and have been treated differently by different trial Judges.

Conclusion

Each of the questions presented is of grave public importance. Unless the ruling below is reviewed, the law relating to the questions presented will be left in confusion.

WHEREFORE, your petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the District of Columbia Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Court of Appeals in the case numbered and entitled on its docket No. 10,696, William A. Goodloe, Appellant *vs.* United States of America, Appellee; to the end that this cause may be reviewed by this Court, as provided for by the statutes of the United States of America; and that the judgment of the said Court of Appeals be reversed by this Court; and for such further relief as to this Court may seem proper.

Dated: June —, 1951.

CHARLES E. FORD,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 97

WILLIAM A. GOODLOE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of Courts Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit has not yet been reported, but appears at R. 55.

The trial Court issued no formal opinion.

Jurisdiction

1. The date of the Judgment to be reviewed is December 14, 1950.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Title 28, Section 1254, U. S. Code.

Statement of the Case

This has already been stated in the preceding Petition and is hereby adopted and made a part of this brief in the interest of brevity.

Specification of Errors

Errors urged and questions presented are contained in the Petition for Writ of Certiorari (*supra*).

The summary of Arguments and Arguments on each question will follow the order set forth in the Petition.

Question I

Whether the trial Court committed error by allowing one of the jurors to take notes during the course of trial, both prior and subsequent to objection thereto by petitioner.

Summary of Argument on Question I

a. The Court should not permit a juror to take notes, particularly when there is objection to that by a party.

b. The taking of notes gives the juror taking them an undue influence in discussing the case; his notes may be inaccurate, meager, careless, or incomplete.

c. Even if the matter of a juror taking notes is within the discretion of the Court, it is an abuse of such discretion to permit the same if there is objection made.

Argument on Question I

At the beginning of the trial session, petitioner's counsel informed the court that juror No. 10 had been taking notes at different intervals throughout the trial. Counsel thereupon moved for a mistrial. The Court stated that he had

observed the juror taking notes throughout the trial, and said that the juror had a right to take the notes (R. 24-25). At different points throughout the entire trial, juror No. 10 continued to take notes of the testimony, and it so happened that this same juror became the foreman of the jury and was the same one who in open Court turned and said something to another juror when the latter reported his verdict as "not guilty" (R. 51-52). The attention of this Court is directed to the case of *U. S.* v. *Davis* (1900; C.C. 103 F. 457, affirmed in 1901; C.C.A. 6th, 107 F. 753), where the Court stated that the practice of a juror taking notes was improper, although it did say that it was perhaps in the discretion of the trial Court to permit such action by a juror. In condemning the practice the Court in the *Davis* case stated:

> "It gives the juror taking notes an undue influence in discussing the case when he appeals to his notes to settle conflicts of memory. Without corrupt purpose, his notes may be inaccurate, or meager, or careless and loosely deficient, partial, and altogether incomplete. With a corrupt purpose, they may be false in fact, entered for the purpose of misleading or deceiving his fellows when he comes to appeal to them. There is no protection against such dangers except to forbid the practice . . ."

As evidence of the wisdom of the above-quoted passage from that case that "It gives the juror taking the notes an undue influence", it is again called to the attention of this Court that this same juror No. 10 became the foreman of the jury. Yet the Court below has unequivocably stated that such a practice is discretionary with the trial Court, whether objected to or not by a party.

This Court has never passed upon the question, and research discloses that the matter was raised but not passed on because not properly assigned of record. See *Agnew* v.

U. S., 165 U. S. 36. See also a discussion on this question in 154 ALR 880.

A jury verdict represents and is based on the collective recollection of all 12 members. As is pointed out in the *Davis* case (*supra*), the practice of one juror taking notes gives that juror an undue influence in discussing the case when he appeals to his notes to settle conflicts of memory.

Counsel for petitioner has been a trial lawyer for more than 20 years, and never has he observed a Court permitting a juror or jurors to take notes of testimony. Counsel is certain that such a practice was not permitted at common law. The constitutional provision for jury trial was such as was in contemplation of the framers of the Constitution. Innovations and small encroachments on a Constitutional right should not be tolerated or permitted under the guise of "discretion."

Question II

Whether upon the trial of a Negro for an alleged abortion on a white woman, it is proper for the prosecutor on cross-examining Negro witnesses to stress that complainant was a white woman, especially where complainant appeared and testified and was observed by the jury.

Summary of Argument on Question II

It is not proper for a prosecutor by means of cross-examination or otherwise to appeal to racial prejudice.

Argument on Question II

While a witness for petitioner, Bessie White, petitioner's cook, was being cross-examined by the prosecutor, the following took place in the presence of the jury:

> Q. Had you seen any other girls there for the past ten years? Staying at that house?
> A. Only his guests.

Q. I meant white girls, like Miss Huffman. (Complainant) (R. 28-29).

Again, while the petitioner was being cross-examined by the prosecutor, the following took place in the presence of the jury:

Q. There was no conversation at all about where the girl was coming from, was there, Doctor?
A. None at all.
Q. Did you ask him whether or not she was a white girl or a colored girl?
Mr. Ford: "Wait a minute."

Thereupon petitioner's counsel approached the bench, asked for the withdrawal of a juror and the declaring of a mistrial on the ground that the government was introducing in the cause a racial issue. The Court then noted for the record that the petitioner is a colored man, complaining witness is a white woman, and that Captain Gleeson is a white man. Thereupon the judge said, "*These are circumstances that the jury would have a right to consider in determining the question whether the defendant (petitioner) is or is not telling the truth.* Now, I am not going to mention it, *of course,* in my charge to the jury, but the facts are obvious * * *" (R. 29).

It is respectfully submitted that such cross-examination was highly improper and prejudicial, and was clearly calculated to stress the fact that complainant was a white woman and that the petitioner was a Negro.

See *Viereck* v. *U. S.,* 318 U. S. 236, 87 L. Ed. 734, where this Court, in speaking of what is proper conduct on the part of the prosecutor, stated:

"He may prosecute with earnestness and vigor—indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones."

Question III

Whether it was improper for the trial Judge in his charge to the jury to continually and in detail emphasize the testimony of the prosecution witnesses and fail to do so in regard to testimony on behalf of the petitioner.

Summary of Argument on Question III

While the Court may comment on the evidence, he may not do so by an emphasis on one side of the case to an extent that such emphasis would be tantamount to an expression of an opinion on an ultimate issue to be determined by the jury.

Argument on Question III

The Court's charge is set forth in R. 31-45. Petitioner contends that the Judge's detailed discussion of the facts was not one that assisted the jury in understanding the application of the law to the facts, but was a detailed discussion of all the government facts and witnesses, without giving the same treatment to the evidence offered on behalf of petitioner. For example, from P. 726 to 729, inc., of the trial transcript of testimony, the Court identifies by name the government's witnesses, (such as Gloria Huffman, Dr. Wilson, Dr. Millea, Andrew Gleeson, Dr. Harry Smith) and discusses the testimony of each of them. Then, the Court in only a few lines states what the Court believes was the petitioner's testimony, though petitioner's testimony occupies pages 421 to 597, inc., of Vol. IV, and pages 603 to 613, inc., Vol. V of the Transcript. And while the court identifies the government witnesses and their testimony as aforesaid, he does not refer to the testimony of petitioner's witnesses (Bessie M. White and Dr. Ackiss).

At the very beginning of the Court's charge, he admonished the jury that Andrew Gleeson was not on trial here for

his sins, such as they may be, and that attention should be *concentrated* solely on the question whether the defendant Goodloe is guilty or not guilty (R. 32). Gleeson was in law an accomplice, and as such, some concentration should be put on the question of his credibility. Later in his charge (R. 38) the Judge declared that Gleeson was an accomplice and such testimony should be received with care and scrutinized with caution. *If the aforesaid first statement is correct, then the second statement is not correct. If the second statement is correct, then the first statement is not correct.*

Again the Judge, in stating the facts to the Jury regarding Counts Two and Three, recited the testimony of the government's witnesses in detail and by name (Gloria Huffman, two Baltimore police officers, and Dr. Pair) (R. 39-40) yet the Court merely used a few lines (R. 40) in reciting the petitioner's version of the same topic.

The Judge charged the jury, "In this case the defendant denies that any miscarriage took place, or, in any event, that he did anything to produce it." This was not so. Petitioner denied that *he* had anything to do with producing an abortion. However, petitioner introduced medical testimony (cross-examination of Dr. Smith and testimony of Dr. Ackiss) which established that the placental tissue found in Gloria Huffman could have been there for a long time prior to her visit to petitioner as a result of an abortion occurring prior to her visit to petitioner.

The foregoing was called to the Court's attention by way of exceptions to his charge after he finished it and appear in R. 45-48.

It is respectfully urged that a reading of the entire charge, particularly the comment on the evidence which the Court made, will show that it was argumentative in favor of the prosecution's aspect of the case. Such a practice has been condemned by many courts, and by this Court in recent

cases. See *Sullivan* v. *U. S.*, 85 U. S. App. D. C. 409, 178 F. (2d) 723; *Billeci* v. *U. S.*, No. 10,525, decided August 2, 1950, U. S. App. D. C., and the numerous cases cited therein.

Question IV

Whether it is error for the Court to refuse to give an instruction to the effect that the complainant in an abortion case, while not an accomplice, inasmuch as she morally implicated herself in the act, that the jury should consider that circumstance as bearing on her credibility.

Summary of Argument on Question IV

In a trial of a physician for an abortion, it is error for the Court to deny requests for instruction that the complainant in an abortion case, while not an accomplice, since she morally implicates herself in the act, the jury should consider that circumstance as bearing on her credibility.

Argument on Question IV

Counsel for petitioner requested the Court to charge the jury that the complainant in an abortion case, while not an accomplice, inasmuch as she morally implicates herself in the act, the jury should consider that circumstance as bearing on her credibility (R. 30-31). In the case of *Thompson* v. *U. S.*, 30 App. D. C. 352, 362, that Court approved such an instruction.

In this case, where there was such a direct conflict between the testimony of the complainant and the petitioner, this instruction would no doubt have carried weight with the jury, and the failure of the trial Court to give it was prejudicial to petitioner, and in direct conflict with *Thompson* v. *U. S.* (supra).

The only ones testifying to the alleged abortion were Gleeson and Huffman. As to Gleeson's testimony, the

Court correctly charged the jury that it should be received with care and scrutinized with caution, in view of the fact that Gleeson was an accomplice in the eyes of the law. But then the Court stated: *"In this case, of course, the Government is by no means entirely dependent upon the testimony of Gleeson. As I just stated and as you will recall, there was the testimony of Gloria Huffman, to which I have already made reference."* (R. 38.) (Emphasis supplied.)

Question V

a. Whether it is error for the Court to interrogate a juror who dissents during a poll of the jury.

b. Whether it is error for the Court to record a verdict after interruption of a juror who dissents during a poll of the jury, and after the failure of any juror to answer the question of the Court as to whether they unanimously reached a verdict of guilty.

Summary of Argument on Question V

a. When a juror dissents on a poll of the jury, it is improper for the Court to interrogate that juror in any manner, but the Court should direct the jury to return for further deliberation or discharge it.

b. After a dissent by a juror on the poll where the Court states to the jury, "Ladies and Gentlemen of the jury, as the Court understands it, you unanimously reached a verdict of guilty. That is correct, is it not?" and the jury makes no response, there is actually no unanimous verdict rendered; and a verdict recorded under such circumstances is a nullity.

Argument on Question V

After the jury foreman reported the jury verdict of guilty on the three counts petitioner's attorney asked for a poll of the jury. During the poll of the jury, the clerk

called on Juror Clarence Mayo, and he answered "NOT GUILTY." Then the Court immediately asked the juror, "What is your verdict?" and the juror answered the Court, "Not guilty on the first count, but then we weeded it out afterwards." At this point, the foreman of the jury turned to Juror Mayo and talked to him, but what he said could not be heard by petitioner's attorney, as they were separated by their respective, proper positions in the Court-room. Thereupon, the Court, in open court, questioned the juror further, called counsel to the bench, and read Rule 31(d) of the Federal Rules of Criminal Procedure, stating:

> "If in the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged."

The Court did not follow the foregoing rule after reading it to counsel, for the Judge neither directed the jury to retire for further deliberations, nor did he discharge them.

Thereafter, the Court stated if there was any question as to there being a unanimous concurrence, he would direct the jury to retire for further deliberation. At this point, petitioner's attorney again directed the Court's attention to the fact that the jury foreman directed remarks to the juror Mayo when he reported his verdict as "NOT GUILTY." The Court took no action about this fact, but stated to petitioner's attorney that he assumed that he was not questioning the jury's unanimous concurrence, for if he were, he would direct the jury to retire for further deliberations. To this statement by the Court that he was assuming consent on the part of petitioner's attorney that there was a concurrence of opinion, petitioner's attorney specifically stated that he was NOT consenting to the Court's assumption and stood on record. Thereupon the Judge said he was stating his interpretation for the record, and petitioner's attorney thereupon stated that he respectfully disagreed with the

Court's interpretation. Thereupon, the Judge stated to the Jury:

> "Ladies and Gentlemen of the Jury, as the Court understands it, you unanimously reached a verdict of guilty. That is correct, is it not?"

To this question there was no response from the jury. Hence the jury (since Juror Mayo reported his verdict as not guilty), has never reported a unanimous verdict, even though the direct question was asked of them by the Judge as set forth above (R. 49-53).

In this connection, attention is directed to the case of *Bruce* v. *Chestnut Farms-Chevy Chase Dairy,* 75 U. S. App. D. C. 192, 126 F. (2d) 224, wherein that Court stated:

> "There can be no question of the right of a juror when polled to dissent from a verdict to which he has agreed in the jury room, and when this happens, the jury should either be discharged or returned to their room for further deliberation. It is both unwise and undesirable that the court should enter into an argument with the juror or require an explanation of his change of position. • • •
>
> "The correct practice, when a poll of the jury is asked, is for the clerk to call the roll and ask each juror as his name is called to answer—for the plaintiff, or—for the defendant, and if the responses of the individual jurors are not in complete agreement, the jury should be required to retire and give further consideration to the case. • • •
>
> "Judges should bear in mind that a good and valid verdict is not dependent on what the juror agrees to in the jury room, but what the juror agrees to when the jury returns into court to give their verdict, and the questioning of the juror by counsel and the court, though doubtless well intended, should not have been indulged. • • •"

It is respectfully submitted that "a verdict recorded under these conditions is wholly without meaning or effect." *Brown* case (supra), at page 194.

Conclusion

The petition to this Court urging it to exercise its power to supervise the proceedings in the courts below; to decide the important questions of Federal and general law which has not been but should be decided by this Court; to clarify the conflicting opinions concerning certain questions reached as existing in different circuits is thought to present a matter deserving the attention of this Court, to the end that the existing complexities and conflicts may be resolved and an authoritative rule be made available for the guidance of the lower courts; and the existing doubts, confusions, and uncertainties dispelled.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 97

WILLIAM A. GOODLOE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 55-56) is reported at 188 F. 2d 621.

JURISDICTION

The judgment of the Court of Appeals was entered on December 14, 1950 (R. 57),[1] and a petition for a rehearing (R. 58-61) was denied *en banc*

[1] The symbol "R." refers to the printed joint appendix and "Tr." to the original stenographic transcript of record.

on May 11, 1951 (R. 62). The petition for a writ of certiorari was filed on June 5, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether allowing a juror to take notes is within the discretion of the trial court.

2. Whether cross-examination, otherwise relevant and proper, is prejudicial because it refers to the color of people.

3. Whether in reviewing the evidence in his charge to the jury the trial judge exceeded the authority given to federal judges in such matters.

4. Whether the granting of an instruction cautioning the jury regarding the testimony of the complaining witness in an abortion case is within the discretion of the trial court.

5. Whether the trial court can interrogate a juror who dissents in a poll of the jury, where it appears that the juror thought he was being asked how he voted on the first ballot in the jury room.

RULE INVOLVED

Rule 31(d) of the Federal Rules of Criminal Procedure provides:

> When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unani-

mous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

STATEMENT

Petitioner was tried alone and convicted on three counts of an indictment which (1) accused petitioner alone of using instruments and medicine with intent to procure an abortion on Gloria M. Huffman; (2) charged petitioner and Alice L. Galusha with conspiring to offer a bribe to Miss Huffman to absent herself during the grand jury investigation of the abortion; (3) charged the two with the substantive crime of attempting to bribe the witness (R. 2-4, 10, 49). He was sentenced to imprisonment for twenty months to five years on the first count, and for eight months to two years on each of the other two, to run concurrently after that on the first count had been served (Tr. 758-759, R. 55).

The facts of this case can be stated briefly since the questions presented involve procedural and instructional matters. The evidence of the prosecution tended to show that Andrew Gleeson, in accordance with prior arrangements with petitioner (Tr. 75-78, 249-254), took Miss Huffman to petitioner's house (Tr. 79, 254). She stayed there three days (Tr. 111, 264), being ministered to by one Bessie (Tr. 89, 91, 94-100). Petitioner inserted an instrument (Tr. 82, 87-88) and medicines (Tr. 88) into her body, and thereafter she had a miscarriage (Tr. 100). Gleeson paid petitioner $350

(Tr. 81, 255-256). There was medical testimony that Miss Huffman was pregnant prior to the date of the alleged abortion (Tr. 235-237, 243), and that she thereafter was hospitalized as a result of an abortion (Tr. 321).

Defendant admitted treatment of Miss Huffman (Tr. 428-433) after arrangements with Gleeson (Tr. 422-426), but for a menstrual irregularity. One Bessie White, who said she was cook for petitioner (Tr. 377), remembered Miss Huffman's visit (Tr. 378), but testified that she had brought Miss Huffman meals and had not acted as a nurse (Tr. 379-380). A Dr. Ackiss, in response to hypothetical questions, agreed that the treatment testified to by petitioner was proper for the condition described (Tr. 616-630).

There was also substantial evidence to support the conspiracy and bribery counts in that petitioner had arranged for Miss Galusha to try and stop Miss Huffman from testifying before the grand jury investigating the abortion (Tr. 192), and that, after Miss Huffman had been served with process (Tr. 198), Miss Galusha offered Miss Huffman money to go to California. These conversations were overheard by police officers (Tr. 210, 216-221).

The Court of Appeals unanimously affirmed, and a petition for rehearing *en banc* was denied by that court *en banc* (R. 62).

ARGUMENT

1. During the trial, counsel for petitioner moved for a mistrial on the ground that a juror was taking notes. The court denied the motion remarking that "taking notes is to be encouraged rather than discouraged" (R. 24-25).

There is no merit in petitioner's contention (Pet. 14) that this was error. Every federal court decision in which the question has been discussed has held that the matter of note taking is within the discretion of the trial judge. *Chicago and N.W. Ry. Co.* v. *Kelly,* 84 F. 2d 569, 574 (C.A. 8); *United States* v. *Carlisi,* 32 F. Supp. 479, 483 (E.D.N.Y.); see also *United States* v. *Chiarella,* 184 F. 2d 903, 907 (C.A. 2).[2] Even the old case of *United States* v. *Davis,* 103 Fed. 457, 470 (C.C. W.D. Tenn.), on which petitioner relies, contains a sentence, omitted from petitioner's brief, to the effect that the taking of notes "is perhaps a matter within the discretion of the court, like others of that character."

The view that the matter lies within the discretion of the trial judge accords with modern conditions. The common law rule that note taking was objectionable probably arose from the notion that, in a period when few men could read and write, the ability to take notes might give a juror undue

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[2] State cases to the same effect are collected in 154 A.L.R. 878. The question was raised but not decided in *Agnew* v. *United States,* 165 U.S. 36, 45.

influence. It is hardly likely that this would be true today. As the court said in *United States* v. *Carlisi*, 32 F. Supp. at p. 483:

> There is no legal reason why such notes should not be made by jurors. Judges and lawyers make notes, why not jurors? Certainly the making of notes would better aid their memories and thus enable them to more intelligently consider the evidence.
>
> While it did not happen in this case I see no objection to all jurors, if they desire, making notes which could be used by them to refresh their recollections, when we realize that the purpose of a law suit is to do justice rather than make it a game of chance. The Courts should make progress with the times.

2. Petitioner cites two isolated instances where reference was made to color, and on that basis argues (Pet. 16-17) that the prosecutor was erroneously permitted to appeal to racial prejudice.

During the cross-examination of Bessie White, who testified she was petitioner's cook, the witness stated that she had seen no girls staying at petitioner's house other than his guests and the complaining witness Miss Huffman. Since it was likely that petitioner, being colored, might more customarily have colored guests, and since Miss Huffman was white, it was permissible cross-examination for the prosecutor to ask:

> Q. I meant white girls, like Miss Huffman [R. 28].

No objection to this remark was made by petitioner.

The second reference to color, this time objected to, occurred during the cross-examination of petitioner with reference to arrangements claimed to have been made with Captain Gleeson for the medical care of Miss Huffman. It was obviously pertinent whether the woman mentioned by Captain Gleeson at the time of the purported conversation was the same woman upon whom the abortion was eventually performed. Hence the question:

> Q. Did you ask him whether or not she was a white girl or a colored girl? [R. 29].

The two cited instances afford not the slightest support for an inference that the prosecutor was appealing to race prejudice. Both the complaining witness and petitioner were visible to the jury. It is therefore difficult to understand petitioner's contention that the prosecutor stressed the fact of the difference of color in such a way as to have prejudiced petitioner.[3] Reference to race, where relevant, can be made under circumstances not prejudicial, for example, for identification as in the instant case. *Commonwealth* v. *Velleco,* 272 Mass. 94, 171 N.E. 16; *State* v. *Cohn,* 155 Wash. 644, 285 Pac. 665. For a reversal there must be

[3] The jury consisted of three colored and nine white persons (R. 29).

not only a showing of an improper appeal to racial prejudice, but also injury to the adverse party. *Rosenthal* v. *United States,* 45 F. 2d 1000, 1003 (C.A. 8). No such showing can be made in this case.[4]

3. There is no merit in petitioner's contention (Pet. 18-19) that the trial court's instructions contained error in stressing evidence for the prosecution and failing to give equal stress to that of the petitioner, and in other respects.

A reading of the instructions will show that there was no detailed discussion of the government evidence (R. 31-45). The evidence for both sides was discussed very briefly and actually occupies less than two pages of the transcript (R. 37-40). If the discussion of the prosecution's case exceeds that of the petitioner's, perhaps the explanation lies in the fact that the prosecution case was more voluminous. See *Wheeler* v. *United States,* 165 F. 2d 225, 228 (C.A.D.C.), certiorari denied, 333 U.S. 829. Furthermore a considerable portion of the evidence and of the discussion in the instructions was devoted to the proof of the corpus delicti, that an abortion actually had been committed. None of this evidence directly connected the petitioner with the crime.

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[4] The authority cited by petitioner to support his contention is a dictum in *Viereck* v. *United States,* 318 U.S. 236, referring to a long inflammatory tirade by a prosecutor, unrelated to race, and is hardly relevant here.

Petitioner's defense was that he had not performed an abortion but had treated the complaining witness for a bleeding condition. This evidence was reviewed by the court, without going into the fine medical details of the purported diagnosis and treatment. Petitioner complains that no mention was made of the testimony of Bessie White or Dr. Smallwood Ackiss. Bessie White's testimony did not support the petitioner's defense. She testified that she did not know why the complaining witness stayed at petitioner's home (R. 28). The testimony of Dr. Ackiss had no bearing on whether petitioner had or had not performed an abortion. It was collateral in that it supported petitioner's treatment of the complaining witness, should the jury believe petitioner's testimony that she had first come to his office complaining of bleeding.

The trial judge made no attempt to impress his views on the jury. He was not argumentative, nor was he an advocate. *Billeci* v. *United States,* 184 F. 2d 394, 403 (C.A.D.C.), cited by petitioner, is therefore clearly distinguishable. Here the trial judge made it unequivocally clear to the jurors that the conclusion upon the evidence was theirs to make. Thus he cautioned (R. 33):

> The Court is permitted by law to comment on the facts and on the evidence in order to assist the jury in arriving at its conclusions, but the Court's comments on the facts and on the evidence are not binding on you and

> you need attach to them only such weight as you deem wise and proper. If your recollection or your understanding of the evidence in any particular differs from the Court's recollection or the Court's understanding, then your recollection and your understanding must prevail. Because, the final decision on the facts is solely within your province. My instructions are binding on you only as to the law.

Similar precautionary instructions appear throughout the charge (R. 32-33, 34-35, 39, 45).

Petitioner urges that it was error for the court to instruct the jury that Andrew Gleeson was not on trial for his sins and that attention should be concentrated solely on the question of whether petitioner was guilty or not guilty, and then later to tell the jury that, since Gleeson was an accomplice, his testimony should be received with caution (Pet. 18-19, R. 32, 38). The two statements are in no way inconsistent. Gleeson was not on trial and the jury was correctly told that only the petitioner was on trial. Yet Gleeson by his own testimony was an accomplice, and the court correctly instructed the jury on the law relating to accomplices at the time he mentioned Gleeson's testimony. Both statements were correct.

Petitioner also urges error in that the trial court commented in the charge that "the defendant denies that any miscarriage took place or, in any event, that he did anything to produce it" (Pet. 19,

R. 37). Petitioner in his testimony did not deny that an abortion had taken place, although his not guilty plea did have the effect of requiring the Government to prove that fact. Shortly thereafter in the instructions, the trial court commented: "He denies that he performed an abortion or did anything to induce a miscarriage" (R. 39). When the two comments are read together, and in the light of the precautionary instructions, the possibility of prejudice to petitioner disappears.

4. Petitioner complains (Pet. 20-21) of the court's refusal to give the following requested instruction (R. 30-31):

> The jury are instructed that according to the testimony of Gloria Huffman, while she is not an accomplice strictly speaking, inasmuch as from her own evidence she morally implicates herself in the act, the jury should consider that circumstance as bearing on her credibility.

Petitioner failed to renew his request in his lengthy objection after the instructions had been given.[5]

Petitioner correctly points out that such an instruction was approved in *Thompson* v. *United States,* 30 App. D.C. 352, 362. But nothing in that

[5] It should be noted that petitioner did not comply with Rule 30 of the Federal Rules of Criminal Procedure, in that he failed to point out the supposed error to the court. Merely requesting an instruction is not sufficient. He must renew his request at the end of the charge to raise the point on appeal. *Villaroman* v. *United States,* 184 F. 2d 261 (C.A.D.C.).

decision can be cited as holding that such an instruction must be given if offered. The court, in upholding the refusal to give a stronger instruction, merely stated that the instruction given "was as much as the defendant had a right to expect."

Since the jury here was given an adequate instruction as to determining the credibility of witnesses (R. 34-35), it was within the discretion of the trial judge to refuse a more specific instruction. *Shettel* v. *United States,* 113 F. 2d 34, 36 (C.A. D.C.) (professional detectives); *State* v. *Moothart,* 109 Iowa 130, 80 N.W. 301, 302 (abortion); *People* v. *Barnett,* 99 Cal. App. 409, 278 Pac. 885 (lascivious conduct with female under 14). Many courts go still further, stating that cautionary instructions should apply to all witnesses alike; and that it is erroneous for a trial judge to single out a witness, other than an accomplice, for special instructions regarding credibility. *State* v. *Stemmons,* 275 Mo. 544, 205 S.W. 8, 11 (seduction); *State* v. *Young,* 55 N.D. 194, 212 N.W. 857 (statutory rape); *State* v. *Hanson,* 53 S.D. 205, 220 N.W. 518, 520 (abortion); compare *Bronstein* v. *United States,* 17 F. 2d 12 (C.A. 8) (governmental investigators). The charge of the court as given fairly and correctly stated the applicable rule and was all that petitioner could rightfully demand. A specific instruction as to the credibility of Miss Huffman, if not erroneous, was certainly a matter for the discretion of the trial court.

5. In the poll of the jury, one juror at first replied, "not guilty." When asked to repeat his verdict, he stated: "Not guilty on the first count, but then we weeded it out afterwards." And when the court asked him: "What is your verdict at this time," the answer was, "Guilty." (R. 49-53.) It is evident that the juror was confused and did not mean to dissent from the verdict. The situation is therefore unlike that involved in *Bruce* v. *Chestnut Farms-Chevy Chase Dairy,* 126 F. 2d 224 (C.A.-D.C.). Here there was no argument with the juror, no request for an explanation and no repeated questioning. The trial judge asked the juror to repeat his answer, and the juror of his own volition explained that he meant he had originally voted for an acquittal on the first count.

Furthermore, the trial judge offered to send the jury out for further deliberations in accordance with Rule 31(d) of the Federal Rules of Criminal Procedure, if there was any question in the mind of counsel for petitioner as to their unanimity. Counsel refused to avail himself of the offer, announcing he would stand on the record as it was (R. 52). It seems obvious that counsel realized that the verdict was unanimous and that rather than allow further deliberation, his best tactic was to preserve whatever confusion remained in the record.

CONCLUSION

The judgment below is correct and no conflict of decisions or question of importance is presented. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1951.

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